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The Quest for an Ideal State Administrative Rulemaking Procedure

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THE QUEST FOR AN IDEAL STATE ADMINISTRATIVE RULEMAKING PROCEDURE*

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THE quest for an ideal administrative procedure is a hardy perennial. It is evidence of the American faith in law reform as a means of making progress. This Article pursues the quest for an ideal administrative procedure in the context of state administrative rulemaking—the process by which state agencies create law of general applicability.[1] In doing so, the Article takes the position that the ideal administrative rulemaking system should be "political" and should be based upon a process of "comprehensive rationality." It should also work an adequate accommodation between the need for procedures calculated to ensure that rulemaking is politically acceptable, technically sound, lawful, and fair, and the need for effective, efficient, and economical state government.

A "political" rulemaking process seeks to ensure that administrative bodies do not adopt policies with the binding force of law when the general public does not want those policies,[2] even if the policies desired by the agencies are technically sound, lawful, and reasonable. Consequently, a political rulemaking process creates, and makes effective, opportunities for public political pressures to shape the administrative rulemaking product at the time it actually occurs, and to prevent agencies from adopting law that is unacceptable to the current interest group balance of power in the community at large. It assumes that because they are experts, agencies should initially formulate the remedies for problems whose resolution has been delegated to their discretion. But if the everyday political process in the community

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1. This Article focuses upon *state* administrative rulemaking procedure as distinguished from rulemaking procedure in general, which would include *federal* rulemaking procedure. The differing circumstances and legal traditions of state governments as compared to the federal government will often justify the imposition of different procedures on their respective administrative agencies. *See generally* Bonfield, *State Law in the Teaching of Administrative Law: A Critical Analysis of the Status Quo*, 61 TEX. L. REV. 95 (1982).

2. *See generally* Scalia, *Two Wrongs Make a Right: The Judicialization of Standardless Rulemaking*, REGULATION, 38 (July-Aug. 1977); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

finds the solutions devised by those experts to be unacceptable, the will of the agencies should be subordinated to the will of the people, even if the latter is uninformed, unsound, or even foolish.

A political scheme of agency rulemaking is desirable because, in our society, sovereignty resides in the community as a whole rather than in its administrative agents. Consequently, an everyday, "politically sensitive" scheme of rulemaking "seems infinitely preferable to the regime of 'public policy by analysis.'"[3] Such a scheme not only reflects the ultimate sovereignty of the people but also acts as a relatively reliable means for ascertaining the current political will of the community with respect to the exercise by agencies of rulemaking authority under broad and open-ended delegations of power.

Of course, our legislatures could ensure that administrative rulemaking is both lawful and consistent with the will of the body politic by imposing substantive limitations rather than procedural constraints on agencies. Detailed and specific statutory language expressly limiting rulemaking authority, coupled with judicial review, could assure that agencies stay within the scope of their substantive powers. Detailed and specific statutory language could also assure that agencies adopt rules that are substantively similar to statutes the politically responsive legislature would have adopted had the legislature attempted, on its own, to solve the problems at which the agency rules were directed. However, that means of popular control over the rulemaking process has largely failed. Legislatures across the country have repeatedly delegated rulemaking authority to agencies without providing detailed and specific statutory standards to guide them in the exercise of that authority.

As a result, a political scheme for agency rulemaking is essential. It ensures that agencies do not adopt, under the broad and open ended delegations of authority vested in them, law that is inconsistent with the current political will of the community.[4] It does so by providing an effective way for members of the public to organize and direct at agencies engaged in rulemaking the same political pressures that are directed at the legislature when it enacts legislation, thereby securing similar substantive results: lawmaking that is compatible with the contemporary wishes of the body politic.

This Article also takes the position that the ideal system of administrative rulemaking should be based on a process of "comprehensive rationality."[5] Such a process requires a positive, planned, all embrac-

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3. Scalia, *supra* note 2, at 40-41.

4. *Id.*

5. *See generally* Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393 (1981).

ing, fully informed, technically proficient, super-rational approach to agency lawmaking. As a result, comprehensive rationality demands that agencies precisely specify all of the goals of their rulemaking and clearly identify all of the alternative means by which those goals may be realized. It also requires agencies to engage in a careful, complete, and technically sophisticated consideration of the effectiveness of each of those alternatives and to select the alternative that will most effectively achieve the desired result. In addition, a scheme of comprehensive rationality requires agencies to plan in order to avoid problems before they occur, and to take affirmative action to achieve their specified goals. Finally, it requires them to base their decisions on the most complete and accurate information and technical analyses available.[6]

Because a process of comprehensive rationality requires such a positive, planned, all-embracing, fully informed, technically proficient, super-rationalist approach to agency rulemaking, it is likely to result in the highest quality lawmaking. Therefore, comprehensive rationality embodies the ideal towards which we should strive. However,

> [o]nly a superhuman decisionmaker could faithfully adhere to the ideal of comprehensive rationality. He would have to be able to identify goals unambiguously, which would sometimes require reconciliation of numerous competing objectives. He would need a Jovian imagination to conceive of every possible means to attain his goals. Finally, he would have to anticipate the precise consequences of adopting each alternative and to invent a metric that permits comparison among them.[7]

In addition, a super-rational administrative rulemaking process can be very expensive, since it makes virtually endless demands on the resources and technical capacities of agencies. The standards of comprehensive rationality are also so high that agencies can almost always be found to have fallen short, justifying the invalidation of their law for an analytical failure.

Important competing public values necessitate compromises in the building of an optimum agency rulemaking scheme. After all, while we want agency rulemaking to be acceptable to the community at large, technically sound, lawful, and fair, we also want government administration to be effective, efficient, and economical. The first set of desires clearly conflicts, at times, with the second, requiring accom-

6. *Id.* at 418-21.
7. *Id.* at 396.

modations between them. Similarly, the desire for a political rulemaking process may conflict with the desire for a rulemaking process grounded on principles of comprehensive rationality. Consequently, the optimum rulemaking process may fall somewhat short of the theoretical ideals embodied in undiluted notions of political responsibility and comprehensive rationality. Nevertheless, the optimum scheme for administrative rulemaking must accommodate all of these competing desires so that the realization of each is maximized to the extent feasible and practicable and their relative values in particular contexts are appropriately expressed.

In pursuing the quest for an ideal state administrative rulemaking process, this Article focuses upon the rulemaking and rule review provisions of the 1981 Model State Administrative Procedure Act (MSAPA),[8] the most recent effort to formulate a comprehensive set of procedures on this subject. Those procedures create a political rulemaking system that reflects the values of comprehensive rationality. However, they also strike a reasonable accommodation between the need for procedures calculated to ensure that state agency rulemaking is politically acceptable, technically sound, lawful, and fair, and the often conflicting need to ensure effective, efficient, and economical state government administration.

The provisions of the MSAPA relating to rules have four principal objectives.[9] First, they are designed to ensure that agency rulemaking determinations are democratic, in the sense that the body politic may effectively thwart the adoption of rules that are politically unacceptable even if they are technically sound and lawful. To accomplish this purpose, the MSAPA provides means by which the public can monitor, and organize effective political opposition to, the adoption of a rule. Additionally, it provides means by which elected officials may veto rules adopted by agencies that are inconsistent with the will of their constituents. Second, the MSAPA provisions are designed to facilitate the making of technically sound rules. For this purpose, an agency engaged in rulemaking is required to elicit from members of the public all of the information relevant to the merits of a proposed rule and to provide them with an opportunity to controvert any such information. The agency must then consider all of this data and explain its precise reasons for adopting the rule in light of that data.

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8. UNIFORM LAW COMMISSIONERS' MODEL STATE ADMINISTRATIVE PROCEDURE ACT (1981), 14 U.L.A. 70 (1990) [hereinafter 1981 MSAPA]. For a detailed analysis of the rulemaking provisions of the 1981 MSAPA, see A. BONFIELD, STATE ADMINISTRATIVE RULEMAKING (1986 and Supp. 1989).

9. *See* 1981 MSAPA, *supra* note 8, at Article III Comment (discussing explicitly three principal objectives and implying a fourth).

Third, the MSAPA provisions are calculated to ensure that agency rulemaking determinations are lawful. To achieve this objective, they focus attention on the information necessary to determine the legality of a proposed rule, and establish an accessible record that is adequate to facilitate such a determination. In addition, the MSAPA provides several mechanisms for the external review of the legality of rules. Finally, these provisions of the MSAPA are also calculated to ensure, in a general sense, that the process of agency rulemaking is fair by providing a proper balance between the prior three objectives of rulemaking procedures and the need for effective, efficient, and economical government administration. They also provide various opportunities for members of the public to obtain information about the rulemaking process, to participate in the process, and to have adequate notice of and time to adjust to the requirements of new rules before they take effect. In addition, they provide means by which persons who are affected by the process and who believe they have been improperly treated by the process in a particular instance may seek relief from the action involved.

I. Specific Rulemaking Procedures

Following the law in most states, the MSAPA defines a "rule" to mean the whole or a part of any agency statement of general applicability that implements, interprets, or prescribes law or policy, and includes the amendment or repeal of an existing "rule."[10] It does not matter what the agency calls the statement. If it fits the definition of a "rule," it is subject to the rulemaking and rule review requirements of the MSAPA.

A political model of rulemaking and principles of comprehensive rationality require opportunities for the general public to ascertain on a continuous basis the nature and content of proposed agency rulemaking. Therefore, to facilitate the monitoring of the rulemaking process by the community at large, the MSAPA imposes several requirements. It requires each agency to maintain a public rulemaking docket that indicates all rulemaking by the agency currently in process and all of the relevant information about each proposed rule.[11] It also requires that a rulemaking proceeding be commenced by the publication of a notice of the proposed rule in a widely disseminated administrative bulletin, at least thirty days before adoption of the rule.[12] That

10. *Id.* § 1-102(10).
11. *Id.* § 3-102.
12. *Id.* § 3-103(a).

notice must contain a statement of the purpose of the proposed rule, an indication of the specific legal authority of the agency to issue the rule, its full text, and an indication of where, when, and how individuals may communicate their views on the proposed rule to the agency.[13] Publication of the full text of a proposed rule is required to ensure that members of the public have fair notice of the *precise* action contemplated by the agency and an opportunity to ascertain accurately the effect of the contemplated rule on their interests. Publication of a summary of the proposed rule will often not be adequate to permit potentially affected persons to determine the precise effect of that rule, if adopted, on their interests.

After the required notice publication, members of the public may participate in the rulemaking proceeding. Such participation implements the ideal of comprehensive rationality because it helps to assure that the agency is informed of all information relevant to the technical merits of its proposed rule. That participation also implements the political model of rulemaking because it helps to create an environment in which the agency may be made aware of, and be forced by public pressures to respond to, the contemporary wishes of the community at large.

The MSAPA gives members of the public a right to submit written input on the proposed rule.[14] It also requires an oral legislative or argument-style proceeding on a proposed rule, if such an oral proceeding is demanded by a specified legislative committee, the governor's administrative rules counsel, a political subdivision, an agency, or twenty-five persons.[15] An oral rulemaking proceeding must be open to the public and be recorded.[16] Subject to reasonable agency rules of procedure, any person may participate in that oral proceeding.[17] The agency, a member of the agency, or another person may preside over an oral rulemaking proceeding; but if the agency itself does not preside over the proceeding, a summary of its contents must be prepared for the agency by the person who did preside.[18]

It would be undesirable to require such an oral proceeding in every rulemaking. After all, an oral proceeding will usually be more expensive than a wholly written proceeding and will often be no more effec-

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13. *Id.*

14. *Id.* § 3-104(a).

15. *Id.* § 3-104(b)(1). Note that the Florida Administrative Procedure Act, chapter 120, Florida Statutes, requires a "public hearing" on a proposed rule if *any* affected person demands such an oral proceeding. FLA. STAT. § 120.54(3)(a) (1989).

16. 1981 MSAPA, *supra* note 8, at § 3-104(b)(3).

17. *Id.* § 3-104(b).

18. *Id.* § 3-104(b)(3).

tive than a wholly written proceeding. Therefore, the costs of requiring such a proceeding in every rulemaking are likely to outweigh its benefits. Furthermore, the particular demands established by the MSAPA as a precondition to the imposition of a requirement that an oral proceeding be held in a rulemaking appear to provide a reasonable basis for distinguishing between those instances in which the costs of holding such an oral proceeding are likely to be justified and those in which they are not.

It should be stressed that, in rulemaking, the MSAPA only creates a right, after a proper request, to an oral *legislative* or *argument-type* hearing. It does not create a right to a judicial or trial-type hearing in such a proceeding. There are several reasons for this. Trial-type procedures are calculated to settle disputed facts of particular applicability that are normally of a very specific and narrow nature. Confrontation of witnesses and the rebuttal and cross-examination of witnesses has proven to be helpful for this purpose. However, rulemaking is designed to formulate general policy. One cannot prove through the use of trial-type procedures that a certain policy is desirable. That conclusion embodies a value judgment, even though it may be based in part on disputed facts of a broad nature—legislative facts. A universal right to a trial-type hearing in rulemaking would seriously affect the efficiency of agencies, and the costs of those procedures would almost always exceed their benefits.[19] Most of the information needed by the agency and opposing parties in a rulemaking proceeding may be obtained through inexpensive notice and comment procedures. Requirements of judicial-style hearings in rulemaking with cross-examination of witnesses have proved very burdensome. Trial-type proceedings in rulemaking tend to be drawn out, repetitious, and unproductive, and have often been used solely for delaying agency action. Even where factual issues are in dispute, those issues are usually too broad and too general for successful resolution by trial-type procedures.

It could be argued that to implement the ideal of comprehensive rationality, trial-type procedures should be available to resolve specific factual issues that may arise in a rulemaking proceeding. In that way participants in a rulemaking would have an opportunity to examine the information on which an agency relies in the proceeding, and a fully effective opportunity to rebut that information. However, requirements of a public rulemaking record, a statement of the purpose of a proposed rule, and a statement of reasons for its adoption, in

19. Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 2 RECOMMENDATIONS AND REP. ADMIN. CONF. U.S. 834, 870-71 (1970-1972).

combination with a right to make written and oral submissions on a proposed rule, go a long way toward accomplishing that result at a much lower cost than would be engendered by the use of trial-type procedures; and the MSAPA imposes all of those requirements on rulemaking proceedings subject to its provisions.[20] Furthermore, an agency, in its discretion, may make trial-type procedures available in MSAPA rulemaking proceedings[21] whenever it determines that they would be especially helpful and their benefits would outweigh their costs.

Of course, *special* statutes may also require trial-type hearings for narrowly drawn and clearly identified classes of rulemaking of certain agencies in light of the special characteristics of those particular classes of rulemaking. But the circumstances justifying such special legislative action are likely to be rare because, in the overwhelming number of situations, the costs of required trial-type proceedings in rulemaking will far exceed their benefits. To implement the ideal of comprehensive rationality, however, it may be desirable to add an explicit provision to the MSAPA authorizing persons to petition for trial-type procedures in rulemaking on the basis of a claim that those procedures would, in the particular circumstances, be a useful and efficient way of resolving important disputed factual issues. To obtain those procedures, the petitioner would have to persuade the agency that the procedures the agency had already provided in that rulemaking were insufficient, and that the additional procedures requested were desirable and appropriate under the circumstances because their benefits *clearly* outweighed their costs. A provision of this kind might explicitly require the agency to either grant petitioner's request for those additional procedures or to issue a statement of reasons for its refusal. This would create a record for judicial review.[22] However, the proposed provision should clearly state that an agency is not required to grant such a petition and that the agency's determination that the benefits of trial-type procedures do not outweigh their costs in this context is presumed correct and will not be overturned on judicial review in the absence of a *very strong* showing that it is wholly unreasonable. Even so, such a provision could be undesirable because the availability of judicial review to challenge the denial of such a petition might be used to coerce agencies into providing trial-type procedures

20. 1981 MSAPA, *supra* note 8, at §§ 3-112, -103(a)(1), -104(a), (b)(1), -110.

21. *Id.* § 1-103(c).

22. Barr, *Judicial Review of Informal Rulemaking Procedure: When May Something More Formal Be Required?*, 27 AM. U.L. REV. 781, 812-17 (1978).

in rulemaking in situations in which they are not justified on a cost-benefit basis.[23]

In specified circumstances the MSAPA requires an agency to issue a cost-benefit, regulatory analysis for a proposed rule.[24] It must also publish a summary of the analysis in a timely manner and make copies of the full analysis available to members of the public.[25] Unless waived, that analysis must describe "the classes of persons who probably will be affected by the proposed rule," the "impact of the proposed rule, economic or otherwise, upon affected classes of persons," and "the probable costs" to the government of implementing and en-

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23. Note that the Florida Administrative Procedure Act, FLA. STAT. § 120.54(17) (1989), contains a "draw out" provision allowing persons affected by a rulemaking proceeding to turn it into a trial-type format, whether or not the agency believes that the benefits of that format would exceed its costs. A petitioner has a right to such a trial-type proceeding in rulemaking whenever he or she "affirmatively demonstrates" to the agency that petitioner's "substantial interests will be affected" by the proposed rule, and that "the proceeding does not [otherwise] provide [an] adequate opportunity to protect those interests." This provision may be defective in two respects. The provision may be overbroad because it does not recognize that even when "substantial interests" of a petitioner may be affected and petitioner can demonstrate that the proceeding "does not provide an adequate opportunity to protect those interests," the costs to the community of turning the proceeding into the trial-type format deemed necessary by petitioner to protect the interests at stake may far exceed the specific benefits of that format to either the petitioner or to others who are similarly situated. The Florida provision may be unwise even if the merits of this argument are unconvincing, or even if this argument is based upon a misconstruction of the language of the provision. This is so because, in its current form, the provision may provide a mechanism with which petitioners, in practice, could coerce agencies into providing trial-type procedures in rulemaking proceedings when they are not justified. After all, agencies could seek to protect themselves against the realistic threat of law suits with unpredictable outcomes that challenge their failure to provide trial-type procedures by automatically providing those additional procedures whenever they are requested. This would be an undesirable result because it would mean the use of trial-type procedures in many rulemaking proceedings in which their costs exceed their benefits. However, empirical data is necessary to resolve this question in a definitive manner.

Section 1-107(a)(2) of the 1981 MSAPA, *supra* note 8, appears to differ from this Florida statutory provision in at least one respect. Unlike the Florida provision, the MSAPA provision does not *require* an agency to convert a rulemaking proceeding into any other kind of proceeding unless *another* provision of law mandates that result, and the Model Act does not contain any provision that explicitly requires an agency, *wholly on its own authority*, to convert a rulemaking proceeding, in which trial-type procedures are normally unavailable, into an adjudicatory proceeding, in which they are available. *Cf.* 1981 MSAPA § 4-101(b). The only Model Act provision that might be read to require that result implicitly is § 5-116(c)(8)(iv), which authorizes a court to invalidate agency action that is "unreasonable, arbitrary, or capricious." But that provision may not *require* trial-type procedures upon request in *every* rulemaking in which "substantial interests" of petitioner may be affected and petitioner can demonstrate that "the proceeding does not [otherwise] provide [an] adequate opportunity to protect those interests." FLA. STAT. § 120.54(17) (1989). The reason for this is, as noted earlier, that the costs of trial-type procedures in rulemaking may, even in those circumstances, sometimes exceed their benefits and, therefore, justify an agency's refusal to allow them even after such a request.

24. *See infra* text accompanying note 29.

25. 1981 MSAPA, *supra* note 8, at § 3-105(d), (e).

forcing the proposed rule.[26] The regulatory analysis must also contain, unless waived, "a comparison of the probable costs and benefits of the proposed rule to the probable costs and benefits of inaction," an assessment "of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule," and an indication "of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency" and the reasons for their rejection.[27] Finally, the data relied upon must be quantified, where possible, and the analysis must consider both short-term and long-term consequences.[28]

The regulatory analysis requirement implements both the ideal of comprehensive rationality and the political model of rulemaking because it is calculated to ensure an adequate opportunity for the agency and the public to evaluate the desirability of a proposed rule and an adequate opportunity for those who oppose it to do so effectively. That is, this requirement structures agency and public consideration of the technical merits of proposed rules in a helpful way and facilitates the political process surrounding the adoption of proposed rules.

An agency is required to issue such a cost-benefit, regulatory analysis with respect to a proposed rule only if the governor, a specified legislative committee, a political subdivision, an agency, or 300 persons signing one request, formally demand such a statement.[29] The preparation of a regulatory analysis is "very burdensome" and expensive.[30] In *most* instances of state agency rulemaking, the costs of preparing such a formal, detailed regulatory analysis will far exceed the benefits of such an analysis. Consequently, the MSAPA does not impose the regulatory analysis requirement on all agency rulemaking.[31] Furthermore, there is a large potential for disagreement about the accuracy of the contents of such an analysis.[32] Therefore, if the right to demand a regulatory analysis were not limited, opponents of proposed rules could request the issuance of these time-consuming and expensive statements simply to harass agencies, or to delay their rulemaking without any compensating public benefit. Moreover, if agencies were

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26. *Id.* § 3-105(b). One or more of these requirements may be waived by the persons requesting issuance of the analysis. *See infra* text accompanying note 29.

27. *Id.* § 3-105(b).

28. *Id.* § 3-105(c).

29. *Id.* § 3-105(a).

30. *Id.* § 3-105 Comment.

31. The 1981 MSAPA rejects, therefore, the approach of the Florida APA, FLA. STAT. § 120.54(2)(b) (1989), because the latter appears to require the issuance of such a formal statement in *every* rulemaking.

32. 1981 MSAPA, *supra* note 8, at § 3-105 Comment.

required to issue such an analysis in every instance of rulemaking, agencies would be likely to compile those statements in a haphazard way, to divert resources to that task from more essential functions, or to deemphasize policymaking by rules in favor of ad hoc adjudicatory orders that could subsequently be relied upon as precedent.[33]

Although the MSAPA suggests that a specified legislative committee, the governor, a political subdivision, an agency, or 300 persons signing one request may invoke the regulatory analysis requirement, it may be desirable to limit the prerogative of invoking this expensive and easily abused requirement to individuals or bodies who are themselves subject to direct political checks. That is, states may want to require the issuance of such a regulatory analysis in rulemaking "*only* upon demand by directly elected officials with general responsibility for state government."[34] Then there will be at least some assurance that the power to trigger this onerous agency duty will not be used indiscriminately and in a way that is inconsistent with the larger public interest.

If a state decides to allow members of the public to invoke this requirement, it should require an effective demand for a regulatory analysis to be signed by a significant number of persons. It should also authorize a waiver of the requirement, once it has been invoked, by a designated legislative committee or the governor when those officials believe the costs of the analysis will exceed its benefits. This waiver device could be an effective check against abuse of the regulatory analysis requirement by persons seeking only to delay issuance of a clearly justifiable rule or to harass the issuing agency. It would seem wise to vest such a checking power in politically responsible officials who are independent of the agency and, therefore, who would be concerned with the public interest generally rather than with the narrow interests of the agency involved.

The Model Act makes clear that so long as the agency makes a "good faith effort to comply," a "rule may not be invalidated on the ground that the contents of the regulatory analysis are insufficient or inaccurate."[35] For this purpose, "'good faith' must be ascertained . . . without any judicial evaluation of the actual sufficiency or accuracy of the contents of that regulatory analysis."[36] Consequently, a

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33. For an elaboration of the reasons why agency policymaking by ad hoc adjudicatory orders is less desirable than agency policymaking by rulemaking, see Bonfield, *State Administrative Policy Formulation and the Choice of Lawmaking Methodology*, 42 ADMIN. L. REV. 121 (1990).

34. 1981 MSAPA, *supra* note 8, at § 3-105 Comment (emphasis added).

35. *Id.* § 3-105(f).

36. *Id.* § 3-105 Comment.

reviewing court will "only determine if the analysis was actually issued, and if on its face it actually addresses in some manner all of the . . . [information] specified in [the Act]. If so, the sufficiency or accuracy of [the] . . . contents [of the analysis] are not subject to judicial review."[37]

A limiting standard governing judicial review of regulatory analyses is essential to an ideal rulemaking procedure. Such a restrictive standard is necessary because judicial review of regulatory analyses could be used by opponents of rules solely to harass the issuing agencies and to delay their rulemaking efforts. Obviously, calculations of the kind that must be embodied in regulatory analyses cannot be made with precision. Analyses will inevitably contain educated guesses that will only be rough approximations. Certainly the courts should not be empowered to second-guess agencies in such circumstances. If they were empowered to do so, the litigation dealing with the adequacy of those statements would be endless and unproductive, and would only serve to delay or prevent the adoption of rules that necessarily must rest on educated guesses and rough approximations. However, if an agency entirely defaults in its duty to issue a regulatory analysis after a proper written request, or fails to comply with other requirements imposed in relation to such an analysis, grounds may exist for judicial invalidation of the rule. Only the "adequacy" of the "contents" of that regulatory analysis should be removed from judicial review. This is the position of the MSAPA.

However, the MSAPA provision limiting judicial review of regulatory analyses might have been better drafted if it simply stated that the "adequacy of the contents of the regulatory analysis is not subject to judicial review."[38] All of the reasons that should make us appre-

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37. *Id.*

38. Florida provides an illustration of the difficulties that courts may face when unrestricted judicial review of an impact statement requirement is available. The Florida APA requires agencies to make "detailed economic impact statement[s]" when they issue rules. FLA. STAT. § 120.54(2)(b) (1989). The courts have struggled to determine whether the absence of such a statement or the inadequacy of the contents of such a statement would render the relevant rule invalid. In Division of Workers' Compensation v. McKee, 413 So.2d 805, 806 (Fla. 1st DCA 1982), the court found that the complete absence of an impact statement was not harmless error and, therefore, the rule in question was invalid. In Department of Health and Rehabilitative Servs. v. Wright, 439 So.2d 937, 941 (Fla. 1st DCA 1983), the court held a rule invalid because of the inadequacy of the impact statement that accompanied its proposal. On the other hand, in Cortese v. School Bd., 425 So.2d 554, 558 n.12 (Fla. 4th DCA 1983), the complete absence of an economic impact statement for a school closing was deemed to be harmless error because there was no showing that the absence of the impact statement harmed the "board's decisionmaking process or adversely affected its decision." And in Plantation Residents' Assoc. v. School Bd., 424 So.2d 879, 881 (Fla. 1st DCA 1982), a Florida court concluded that "if proceedings are not rendered unfair, or if the action is not found to be incorrect, then minimal deficiencies in an

hensive about the potential for endless judicial review proceedings related to these analyses may support such a broad and unqualified prohibition on judicial review of the "adequacy" of their "contents." The current MSAPA formulation could open the door to litigation over whether, in each particular instance where such an analysis is required, the issuing agency actually engaged in a "good faith effort to comply with the requirements" of the MSAPA relating to the contents of such an analysis. A broad and unqualified prohibition on judicial review of the "adequacy" of the "contents" of regulatory analyses may, therefore, more successfully deter wasteful suits concerning these analyses.

The MSAPA provides that within 180 days of a specified point in a rulemaking proceeding, the agency must either terminate the proceeding or adopt the proposed rule.[39] This provision implements the political model of rulemaking by ensuring that an agency may not, if it encounters significant public resistance to its published proposals, allow a long time to pass so that the public forgets about the pendency of that proceeding, and then, without additional notice, adopt those controversial proposals. However, before it adopts a rule, an agency must consider all of the written and oral submissions or memoranda summarizing the oral submissions and any regulatory analyses pertaining to that rule.[40] This provision implements the ideal of comprehensive rationality by ensuring that the agency actually weighs the merits of all of the information tendered to it in the public proceeding before it takes final action on the proposed rule.

The Model Act prohibits an agency from adopting a rule that is "substantially different" from the proposed rule contained in the notice that initiated the rulemaking proceeding on which the adopted rule is based.[41] Specific criteria are included in the MSAPA to illumi-

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economic impact statement will not constitute reversible error." *See also* Health Care & Retirement Corp. of Am. v. Department of Health and Rehabilitative Servs., 463 So.2d 1175, 1178 (Fla. 1st DCA 1984) (agency rule not invalid because economic impact statement was not as detailed as possible; such rules will be struck down only if a deficiency in the economic impact statement impairs fairness).

The approach suggested in the text is preferable to the limitless scope of review used by courts in Florida to review agency conformance with the economic impact statement requirement because the former is more likely to deter litigation than the latter. The reason for this is that the approach suggested in the text *totally* precludes review of the *adequacy* of the *contents* of a regulatory analysis, leaving for review only a failure to issue such an analysis or a failure to comply with some other requirement relating to an analysis. It is true, however, that on the latter issues, courts will have to struggle with the principle of prejudicial error in much the same way as the Florida courts have in the above cases. *See* 1981 MSAPA, *supra* note 8, at § 5-116(c).

39. 1981 MSAPA, *supra* note 8, at § 3-106(b).

40. *Id.* § 3-106(c).

41. *Id.* § 3-107(a).

nate that "substantially different" standard. Three factors must be considered in determining whether the adopted rule is "substantially different" from the proposed rule. First, the agency and reviewing court must consider "the extent to which all persons affected by the adopted rule should have understood that the published proposed rule would affect their interests."[42] Second, the agency and reviewing court must consider "the extent to which the subject matter of the adopted rule or the issues determined by that rule are different from the subject matter or issues involved in the published proposed rule."[43] Finally, they must consider "the extent to which the effects of the adopted rule differ from the effects of the published proposed rule had it been adopted instead."[44] Although application of these criteria will not entirely remove the ambiguity surrounding the term "substantially different," the criteria provide important guidance for determining the acceptability of a particular variance.

The purpose of the "substantially different" requirement is to ensure that the public has had an adequate opportunity in the rulemaking proceeding to comment on the substance of the final rule before it was adopted. Without such a provision, an agency might frustrate that opportunity by holding a rulemaking proceeding on one proposal and subsequently adopting a wholly different rule with respect to which members of the public had no notice, and to which they might have objected, had its contents been anticipated at the time of the rulemaking proceeding. Consequently, the "substantially different" requirement implements both the comprehensive rationality ideal and the political model of rulemaking. The requirement helps to ensure that members of the public have an opportunity to make the agency aware of all relevant information concerning the technical merits of the rule it actually adopts, and that members of the public have an opportunity to organize and direct at the agency whatever political pressures they are disposed to create in light of the rule the agency actually adopts.

In order to reconcile the need for the rulemaking procedures of the MSAPA with the need for effective, efficient, and economical government, the Model Act provides a general good cause exemption from those procedures. Rulemaking procedures may be omitted to the extent they are, in a particular situation, "unnecessary, impracticable, or contrary to the public interest."[45] When an agency relies on this

42. *Id.* § 3-107(b)(1).
43. *Id.* § 3-107(b)(2).
44. *Id.* § 3-107(b)(3).
45. *Id.* § 3-108(a).

provision it must publish a finding that the omitted procedures are unnecessary, impracticable, or contrary to the public interest, and include a brief statement of its underlying reasons for that finding.[46] To avoid agency abuse of the good cause exemption and to discourage its use by agencies in close cases, the MSAPA also shifts the burden of persuasion to the agency as to the propriety of the invocation of this provision.[47]

The "unnecessary, impracticable, or contrary to the public interest" standard contained in the MSAPA good cause provision is preferable to the "imminent peril to the public health, safety, or welfare" standard contained in the good cause exemption of most state APA's.[48] The standard contained in the MSAPA is more flexible than the standard contained in most state acts in two respects. First, the MSAPA standard allows agencies to bypass ordinary rulemaking procedures in particular circumstances to the extent that following them would cause a future *or* an immediate harm. Under the standard in most state acts, those procedures could be omitted only to prevent an *immediate* harm. Second, the MSAPA standard also allows agencies to omit normal rulemaking procedures in particular circumstances to the extent their use is "unnecessary, impracticable, or contrary to the public interest," meaning to the extent those procedures would cause harm that is disproportionate to the benefit that would accrue from their use. The good cause standard contained in most state APA's, however, allows rulemaking procedures to be omitted only to avoid a "*peril*"—a *very serious harm*—to the "public health, safety, or welfare."[49]

The greater flexibility of the MSAPA provision is justified if one believes that required rulemaking procedures should result in efficient, effective, and economical government, as well as in adequate protection for private rights against unsound or illegal agency action. It should be noted that the MSAPA good cause exemption contains a number of safeguards against its misuse in order to preserve as much protection for private rights as is possible in this context. Consider the narrow scope of the standard used in light of its language and the extensive case law and commentary construing it in a conservative

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46. *Id.* § 3-108(a).

47. *Id.* § 3-108(b).

48. *See* Model State Administrative Procedure Act § 3(b) (National Conference of Commissioners on Uniform State Laws 1961), 14 U.L.A. 371 (1980) [hereinafter 1961 MSAPA]. The APA's of most states are based on the 1961 MSAPA, 14 U.L.A. 357, 371 (1980). *See also* FLA. STAT. § 120.54(9)(a) (1989) ("immediate danger to the public health, safety, or welfare").

49. 1961 MSAPA, *supra* note 48, at § 3(b).

manner.[50] As noted earlier, an agency must also publish specific findings and reasons to rely upon this exemption; upon judicial review, it also must bear the burden of persuasion as to the propriety of the invocation of this exemption. Furthermore, as noted next, there is an opportunity for post hoc rulemaking proceedings in some situations in which this exemption has been used. All of these protections are likely to minimize agency abuse of the good cause provision.

The MSAPA allows agencies properly relying upon the terms of its good cause exemption to issue permanent rules thereunder, except where, in a particular instance, the governor or a designated legislative committee formally objects to the issuance of those rules without benefit of usual rulemaking procedures.[51] In that exceptional situation, the otherwise permanent rules issued under the good cause exemption are effective only for 180 days, "forcing the agency to conduct a usual rulemaking proceeding on those rules if the agency wishes them to remain effective for a longer period."[52] This provision is intended to ensure that a post hoc rulemaking proceeding will be held for a rule initially issued without usual procedures on the basis of the good cause exemption, when the rule is sufficiently controversial that a politically responsible official believes such an expensive procedure is justified.

It may be argued that it would be better to require agencies, in *every* case where they have properly dispensed with usual rulemaking procedures on the basis of the good cause exemption, to follow those procedures within 90 days of the effective date of the rule issued in reliance upon that exemption.[53] However, this position is unsound. For some rules, the use of usual rulemaking procedures is undesirable both before their initial issuance and at all times thereafter because the costs of those procedures will predictably exceed their benefits in both situations. However, on this basis, a case may be made for dis-

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50. *See* Bonfield, *Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts*, 118 U. PA. L. REV. 540, 588-608 (1970); Jordan, *The Administrative Procedure Act's "Good Cause" Exemption*, 36 ADMIN. L. REV. 113 (1984); Annotation, *Exceptions Under 5 USCS § 553(b)(A) and § 553(b)(B) to Notice Requirements of Administrative Procedure Act Rule Making Provisions*, 45 A.L.R. FED. 12, 74-97 (1979).

51. 1981 MSAPA, *supra* note 8, at § 3-108(c).

52. *Id.* § 3-108 Comment.

53. Rago, *Rulemaking Under the Model State Administrative Procedure Act: An Opportunity Missed*, 34 ADMIN. L. REV. 445, 454 (1982). The Florida APA, FLA. STAT. § 120.54(9)(c) (1989), concurs. *See also* Recommendation 83-2, 1983 ACUS Report 7, 9. That Recommendation is not as broad as the Rago proposal or the Florida APA because it would only require post hoc rulemaking proceedings in instances where the "impracticable" or "contrary to the public interest" exemption is used, but not in instances where the "unnecessary" exemption is used. *Id.* at 9.

tinguishing between the three MSAPA good cause grounds for exemption from usual procedures with respect to the permanency of the rules issued thereunder. Perhaps agencies should be able to issue permanent rules without benefit of usual procedures only on the basis of the "unnecessary" exemption. Perhaps rules issued without benefit of usual procedures under the "impracticable" and "contrary to the public interest" exemptions should be limited by statute to a specified brief period, unless they are extended or made permanent through the use of all normally applicable rulemaking procedures. This distinction is based on practical considerations. When usual procedures are "unnecessary" there is no utility in subjecting the rules involved to those procedures either before or after the rules are issued; but when usual procedures are "impracticable" or "contrary to the public interest," there may be utility in subjecting the rules involved to those procedures after the rules are adopted, even if important values dictate their omission beforehand.

The principal deficiency of this approach is that it is overbroad—it would require post hoc rulemaking proceedings in some instances where rules had been issued without the benefit of usual procedures because those procedures were "impracticable" or "contrary to the public interest," when the cost of those subsequent procedures would clearly outweigh their benefits. For this reason, the MSAPA solution to this problem may be best. As noted, it requires post hoc procedures only for those rules issued under the good cause exemption as to which a determination has been made, by designated politically responsible public officials who are independent of the agencies adopting the rules, that the cost of subsequent rulemaking procedures is outweighed by their benefits. The new Model Act assumes that the power to turn rules properly issued under this exemption from permanent rules into temporary rules, thereby requiring an agency to subject them post hoc to usual rulemaking procedures in order to extend their effectiveness, is too potent and significant to be vested in affected members of the public. After all, members of the public are likely to use such a power to make temporary rules out of permanent rules properly issued under the good cause exemption whenever they do not like them. Therefore, they are likely to do so even when the cost of the post hoc rulemaking proceedings would clearly outweigh any of their potential benefits.

The Model Act also addresses the need for post-adoption procedures for rules properly issued without benefit of pre-adoption procedures in its provision dealing with petitions for the adoption of rules.[54]

54. 1981 MSAPA, *supra* note 8, at § 3-117.

Any person who is dissatisfied with a rule issued without benefit of pre-adoption procedures under the general good cause exemption may file a petition with the issuing agency containing comments on the adopted rule, with a specific request for its amendment or repeal. An agency must, within 60 days of the time it receives such a petition, either deny the petition, indicating in writing its reasons for doing so, or initiate rulemaking proceedings on the subject of that petition. Agencies must also provide specific procedures for the submission and consideration of those petitions and for their form. Each petition and the agency's written response must be included in the agency rulemaking record required for all rules, including rules issued pursuant to the good cause exemption.[55] So, any post-adoption petition for repeal or amendment of a rule issued under the good cause exemption, and the agency's response to that petition, will be a part of the formal record reviewed by the court on judicial review of the rule.

In sum, the MSAPA right to petition for the amendment or repeal of a rule can adequately achieve most of the objectives sought by requiring agencies to hold a post-adoption rulemaking proceeding whenever they do not hold such a proceeding before adopting a rule because of the good cause exemption. And it does so at a minimum cost to the agencies and in a way that preserves for affected persons as much of the benefits as may reasonably be expected from such post hoc proceedings. Therefore, the right to petition, in conjunction with the MSAPA provision empowering the designated legislative committee or the governor to require a standard rulemaking proceeding as a prerequisite to the continued effectiveness of a rule issued under this general exemption, appears to provide adequate protection for affected persons against rules issued for good cause without the benefit of usual procedures.

The MSAPA differs from most existing state APA's by broadly exempting from required rulemaking procedures all "interpretative rules"—rules that only define "the meaning of a statute or other provision of law or precedent if the agency does not possess delegated authority to bind the courts to any extent with its definition."[56] To eliminate some of the dangers of that exemption, however, the Act requires a court reviewing the lawfulness of such rules adopted without usual procedures to review their propriety wholly anew, without any deference whatsoever to the agency interpretation.[57]

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55. *Id.* § 3-112(b)(7).
56. *Id.* § 3-109(a).
57. *Id.* § 3-109(b).

A number of reasons support this categorical exemption for interpretative rules. First, there appears to be no means to enforce effectively a requirement that notice and comment procedures be followed in interpretative rulemaking. That is why agencies in virtually all states requiring notice and comment rulemaking for interpretative rules have completely ignored the requirement in practice, and have done so with impunity. Suppose an agency issues a wholly interpretative rule without following usual procedures. Suppose, also, that a court subsequently voids the improperly issued interpretative rule because it was not adopted pursuant to applicable procedures. The agency could still issue an ad hoc construction of the law interpreted by the void rule, applying the ad hoc construction (which, of course, would be identical to the content of the void rule) to the particular case at hand. After all, the agency is still bound to enforce the law which the void rule sought to interpret; and in the absence of a statute providing otherwise, the agency may do so initially by an ad hoc construction of that law applicable only to the case at hand, rather than by an interpretative rule issued in advance of any enforcement action in a particular case.

It is true, of course, that on judicial review of a particular case, an agency action expressly relying on an improperly adopted interpretative rule may be vacated because of the agency's impermissible reliance on the void rule. But on remand, the agency may adjudicate an identical interpretation as applied only to that particular case, and the law declared in such an adjudication may usually be retrospective. Furthermore, on judicial review of such a case, the court might even decide that the substantive principle embodied in the void interpretative rule is correct as a matter of law, without ordering a remand of the case to the agency that issued the procedurally improper rule. Therefore, "[t]he practical effectiveness of any available remedy for a procedurally improper agency issuance of an interpretative rule is in doubt."[58]

Second, persons affected by interpretative rules do not need notice and comment rulemaking procedures to protect their interests to the same extent that persons affected by legislative rules need those procedures to protect their interests. This is so because, with respect to legislative rulemaking, state agencies exercise a great deal of discretion to alter people's legal rights that is effectively beyond judicial control, while with respect to interpretative rulemaking they do not. Courts may review rules that are wholly interpretative entirely de novo be-

58. *Id.* § 3-109 Comment.

cause the adopting agency was not delegated the authority to bind the courts to any extent by its interpretation.[59] As a result a state court may properly substitute its judgment for that of a state agency as to the propriety of an interpretative rule, but not with respect to the propriety of a legislative rule. The exemption from rulemaking procedures for interpretative rules may be justified, therefore, on the ground that the extent to which those rules, in practice, will adversely affect the legal rights of individuals is relatively small because those rules may be subject to plenary judicial review. In these circumstances, participation by members of the public in the making of interpretative rules must necessarily be somewhat less important than their participation in the making of legislative rules.

A third justification for the exclusion of interpretative rules from usual rulemaking requirements has been suggested: An "agency should be as free as it can be [when it issues interpretative rules] for the simple reason that those types of regulations are the kind that agencies should be encouraged to make. . . ."[60] Interpretative rules are needed by the public as well as by the agency to dissipate uncertainty as to the exact meaning and scope of agency administered law. If rules of this kind were subject to "the notice and other delay called for by [usual rulemaking procedures], the public would be the first to suffer. . . ."[61] The reason for this is that the burden of following those procedures is bound to discourage agencies from issuing such rules. The volume of interpretative rules issued by agencies is likely to be much larger than the volume of their legislative rules. As a result, usual rulemaking requirements which are expensive will present a more formidable obstacle and disincentive to the making of the former kind of rules than the latter. To avoid procedures they think unduly onerous, agencies may also be able to live more easily without issuing interpretative rules than without issuing legislative rules. After all, the latter comprise the substance and teeth of their regulatory scheme, while the former are only helpful instruments for clarifying that scheme. Note also that in most situations agencies may clarify

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59. *See* West Des Moines Ed. Ass'n v. PERB, 266 N.W.2d 118, 124 (Iowa 1978); 2 F. COOPER, STATE ADMINISTRATIVE LAW 787-88 (1965); 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7:10-:13 (2d ed. 1979) [hereinafter 2 K. DAVIS], 4 K. DAVIS, § 29:20 (2d ed. 1984); 1 C. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 3.52-.53 (1985); 2 C. KOCH, JR., § 9.13 at 118, 9.18; 2 AM. JUR. 2d, *Administrative Law*, § 656 (1962 and Supp. 1989). *See also* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-45 (1984).

60. SENATE COMM. ON THE JUDICIARY, ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. No. 248, 79th Cong., 2d Sess. 76 (1946).

61. Administrative Procedure Act, *Hearings on S. 1663, Before the United States Senate Subcomm. on Administrative Practice and Procedure*, 88th Cong., 2d Sess. 326 (1964).

their law on an ad hoc basis rather than by issuing statements of general applicability.[62]

The exemption for interpretative rules may also be justified on a fourth ground. Without an unqualified and broad exclusion for interpretative rules, there would be uncertainty in many more cases about the applicability of the good cause exemption. That increased uncertainty would be likely to result in unnecessary litigation and might encourage the use of notice and comment rulemaking procedures in situations where they would be unwise. After all, application of the good cause exemption to particular interpretive rules will be more unclear than application to such rules of a categorical exclusion of all interpretative rules from usual notice and comment procedures.

Of course, the determination as to whether a particular rule is exempt from usual rulemaking procedures because it is an interpretative rule will not be entirely free from ambiguity, even though the MSAPA clearly defines interpretative rules exempt under this categorical exclusion.[63] Courts and agencies *have*, on occasion, been confused about the matter.[64] Nevertheless, the analytical distinction between interpretative and legislative rules is reasonably certain,[65] and the practical problems of applying that distinction in order to classify properly particular rules as either the former or the latter are not unusually large or insurmountable. From a quantitative and qualitative point of view, the practical problems involved in determining which rules are interpretative and which are not, are far fewer than the problems that would be created for agencies by the elimination of this blanket exemption. As noted earlier, the elimination of this exemption would have a large and adverse effect on agency efficiency, economy, and effectiveness.

The broad MSAPA exemption from usual rulemaking procedures for interpretative rules may be criticized because courts have often given deference to agency interpretative rules, even though they were not required to do so.[66] Consequently, in practice, interpretative rules often have a substantial adverse impact on the rights of affected parties. Courts have been especially prone to give such discretionary deference to agency interpretative rules when those rules have been long-

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62. *See* Bonfield, *supra* note 33.

63. 1981 MSAPA, *supra* note 8, at § 3-109(a).

64. Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 520, 530-72 (1977).

65. *Id.* at 573. *See also* 2 K. DAVIS, *supra* note 59, at § 7:8.

66. 2 K. DAVIS, *supra* note 59, at §§ 7:13-7:14; 1 F. COOPER, STATE ADMINISTRATIVE LAW 265-66 (1965).

standing,[67] when the statute interpreted by the rules was reenacted by the legislature,[68] when the subject matter of those rules is very technical and, therefore, within the special expertise of the agency,[69] or when they were written by administrators who were especially familiar with and personally involved in the adoption of the statute construed by those rules.[70] The point is that courts have "long given considerable and in some cases decisive weight . . . to interpretative regulations," and while such rules may not be "controlling upon the courts by reason of their authority, [they] do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[71]

However, as noted earlier, state courts are normally free to substitute entirely de novo their interpretations for those embodied in an agency rule that is wholly interpretative because the agency was not delegated authority to bind the courts to any extent with its interpretation. In addition, as indicated previously, the MSAPA expressly provides that "[a] reviewing court shall determine wholly de novo" the validity of an interpretative rule that is adopted without complying with usual rulemaking procedures.[72] Therefore, a court reviewing an interpretative rule issued without benefit of usual rulemaking procedures may consider the agency interpretation together with all other relevant facts and information; but it may not defer in that situation to the agency's view of the law in question *simply because it is the agency's view.*

In addition to prescribing the style, form, and contents of a rule, (which must include a statement of its purpose and the specific legal authority for its adoption),[73] the MSAPA contains a provision requiring each rule adopted by an agency to be accompanied by a concise explanatory statement.[74] The latter requirement seeks to force the agency to consider carefully the precise reasons for its action and ensures that the specific basis and rationale for the rule will be clear to the public. The formal explanatory statement must contain all of an agency's legal, factual, and policy reasons for adopting the rule. How-

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67. 2 K. DAVIS, *supra* note 59, at § 7:14. *See also* NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 (1974); Saxbe v. Bustos, 419 U.S. 65, 74 (1974).

68. 2 K. DAVIS, *supra* note 59, at § 7:14. *See also* NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 (1974); Saxbe v. Bustos, 419 U.S. 65, 74 (1974).

69. 2 AM. JUR. 2d *Administrative Law* § 675 (1962).

70. 2 K. DAVIS, *supra* note 59, at § 7:14. *See also* Norwegian Nitrogen Co. v. United States, 288 U.S. 294, 315 (1933).

71. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

72. 1981 MSAPA, *supra* note 8, at § 3-109(b).

73. *Id.* § 3-111.

74. *Id.* § 3-110(a).

ever, the language of the MSAPA explanatory statement requirement does not go far enough in one respect. In order to more fully implement the ideal of comprehensive rationality, an agency should be required expressly to include in its explanatory statement all of the arguments for and against the rule considered by the agency as well as its reasons for rejecting the arguments against adoption of the rule.[75] Such a requirement is desirable for a number of reasons.

Most importantly, forcing an agency to articulate clearly all of the arguments for and against the rule would force the agency to structure its consideration of the rule in a better way than is currently required by even a broad reading of the existing MSAPA reasons requirement. The additional language would also help to assure much more effectively than the current reasons requirement that the agency in fact fully considered all of the submissions made in that rulemaking proceeding. With such a specific provision, an agency explanatory statement that overlooked some of the arguments made against a rule in the rulemaking proceeding would do so at its peril. Persons opposed to the rule could use such an omission to prove that the agency violated its statutory duty to consider fully all of the submissions in that proceeding. Furthermore, a requirement that the agency formally and clearly articulate all of the grounds for overruling arguments made against a rule would force the agency to do what it is supposed to do in any event—directly and explicitly confront all objections to a proposed rule, and determine whether they are sufficient to prevent its adoption. Requiring the agency to articulate in the concise explanatory statement the precise reasons it rejected arguments made against a proposed rule would also facilitate public and judicial scrutiny of the rationality of the agency's action more effectively than the narrower, more general MSAPA requirement that an agency simply articulate all of its reasons for adopting the rule in question.

Unlike most other APA's, the MSAPA also requires an agency to maintain an official rulemaking record open to the public for each rule it formally proposes or adopts.[76] This record must contain *all* written submissions to the agency and *all* other written materials considered by the agency in connection with that rule. It must also contain a copy of any regulatory analysis issued for the rule and any official transcript or summary of required oral proceedings in that rulemaking, as well as other specified documents pertaining to the rule.[77]

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75. This language was contained in the 1961 MSAPA, *supra* note 48, at § 3 (a)(2). Despite the advice of this Reporter to the contrary, it was omitted from the 1981 MSAPA.

76. 1981 MSAPA, *supra* note 8, at § 3-112(a).

77. *Id.* § 3-112(b).

The required record is intended to help structure a rational agency consideration of the rule, to facilitate adequate consideration of the legality and merits of the rule by members of the public, and to facilitate its judicial review. Consequently, the rulemaking record requirement, like the requirement of a concise explanatory statement, implements the ideal of comprehensive rationality.

Following existing law in most states, the MSAPA does not prohibit *oral* communications to the agency in rulemaking without the knowledge of other participants in that proceeding; nor does the Act require such oral communications to be reduced to writing and to be included in the rulemaking record. The reason for the position of the MSAPA on this matter is that such a prohibition or requirement is likely to interfere significantly with the ability of agencies to gauge accurately the political acceptability of their proposed rulemaking action.[78] Rulemaking procedures will not ensure that agency rules are acceptable to the legislature if those procedures limit agency access to relevant oral communications—that is, if those procedures insulate the agency from any of the information and pressure that would be focused on the legislature if the legislature sought to make those rules itself.[79] Yet this would be the result of any general ban on oral ex parte communications in rulemaking, and/or a general requirement that such communications be reduced to writing and be included in the official agency rulemaking record.

Legislatures receive much of the information and pressure relevant to the political acceptability of their proposed statutes from off-the-record, oral ex parte communications. To ensure that their rules are politically acceptable, agencies must also be able to receive the same information and pressure about proposed rules. However, those who communicate that type of information and pressure to agencies will not do so as readily, clearly, or honestly, if they must do so publicly, or if the contents of their communications must be included in an official, widely available rulemaking record.

An opportunity to make off-the-record, oral ex parte communications to the decisionmaker in rulemaking is, therefore, essential to the implementation of a political model of administrative lawmaking. Any general requirements that directly or indirectly interfere with such communications would necessarily result in much more agency rulemaking that is unacceptable to the legislature and the governor. That, in turn, would be likely to lead to three undesirable consequences. First, the legislature and governor would have to intervene formally in

78. Scalia, *supra* note 2, at 38-41.
79. *Id.* at 41.

agency rulemaking to void an increasing number of politically unacceptable rules. Consequently, a great deal of legislative and gubernatorial time and effort would have to be spent on entirely avoidable problems. Second, the increasing political unacceptability of agency rules, resulting from the required inclusion of a summary of every ex parte communication in the rulemaking record, would result in great tension between the legislature and governor on the one hand and the agencies on the other. After all, those elected officials are not likely to be happy with agencies that cannot accurately gauge the political acceptability of their rules.

Third, other substantial and unnecessary costs would be imposed on the persons regulated and on the agencies if agencies repetitively made rules that turned out to be politically unacceptable and, therefore, were reversed by action of the legislature or governor. Affected persons may have expended needless resources in adjusting their conduct to the requirements of those short-lived agency rules. They may also have relied to their detriment on the content of those rules. In addition, agencies could have utilized their scarce resources for more important purposes than the issuance of such short-lived, politically unacceptable rules.

The MSAPA rejects a compromise that would allow oral ex parte communications in rulemaking, but would require all factual material relevant to the technical merits of a proposed rule that are contained in such oral ex parte communications to be summarized in writing and to be included in the agency rulemaking record. This compromise was adopted, to some extent, by one federal case.[80] The new Model Act rejects this solution for practical reasons. It would be almost impossible to enforce such a requirement. That is so because it would be unusually difficult to demonstrate, in any situation, that factual matter relevant to the technical merits of a rule, rather than opinion or political information, was the substance of an oral ex parte conversation whose content was omitted from the agency rulemaking record. Moreover, the possibility of success, no matter how remote, and the facial legitimacy of attempts to demonstrate a violation of such a requirement, may induce and facilitate lawsuits whose only purpose is to delay the rulemaking process. The law should not be structured in such a way as to encourage this result.

It would also be very difficult for agencies and courts to draw a clear line between factual information relevant to the technical merits of a proposed rule contained in oral ex parte communications, which

80. Sierra Club v. Costle, 657 F.2d 298, 400-08 (D.C. Cir.), *rev'd on other grounds sub nom.* Ruckleshaus v. Sierra Club, 463 U.S. 680 (1981).

must be reduced to writing and be included in the agency rulemaking record, and material of an opinion or political nature not relevant to the technical merits of a proposal, which therefore need not be treated in that manner. Finally, it is unlikely that significant or dispositive *factual* information relevant to the technical merits of a proposed rule will often be communicated to an agency through *oral* ex parte communications. When such information is communicated to an agency in that manner, its general substance is also unlikely to remain unknown to opposing parties in the rulemaking proceeding. Even if opposing parties initially discover agency reliance on such information that was communicated orally and ex parte only in the required statement of reasons issued at the time the rule was adopted, they have a partial remedy. At the time they discover that information, those persons can petition the agency for a reconsideration of its action,[81] and include in that petition material rebutting the previously unknown factual data on which the agency relied. In addition, all of that rebuttal material will be in the record before the court when it judicially reviews the substantive validity of the rule.

Effective implementation of the political model of administrative lawmaking appears to require an opportunity for oral ex parte communications with the decisionmaker, and appears to be inconsistent with any general requirement that such communications be reduced to writing and be included in the agency rulemaking record. On the other hand, an undiluted implementation of the comprehensive rationality ideal of administrative rulemaking appears to require the opposite result. To ensure that rules are based upon the most complete and highest quality information available, opposing parties in a rulemaking proceeding must be able to ascertain and to challenge, prior to the time when the agency takes final action, all of the information that it may rely upon in adopting the rule. At some point, however, the ideal of comprehensive rationality must accommodate to the conflicting needs of the political model of administrative rulemaking. In this particular situation, comprehensive rationality must give way to the political model in order to ensure a reasonably effective role for the latter. However, the compromise in these circumstances for comprehensive rationality is very narrowly drawn. In reality, it is unlikely to interfere substantially with the realization of that ideal.

The MSAPA expressly provides that in proceedings in which the validity of a rule is at issue, only those particular reasons on which the agency relied in its concise explanatory statement may be used as justi-

81. 1981 MSAPA, *supra* note 8, at § 3-117.

fications for adoption of the rule.[82] Consequently, in defending a rule at the time of judicial review, agencies may not offer additional reasons to justify the rule if the reasons offered for its adoption in the explanatory statement are inadequate. However, they may offer the court additional evidence and argument to support the reasons specified in the explanatory statement.[83] And, of course, parties challenging the rule may offer the court additional evidence and argument to demonstrate that those reasons are insufficient or improper or that there are other legal defects in the contents of the rule or in the process of its adoption.[84]

Two kinds of costs are imposed on our society by limiting the reasons used to support a rule on judicial review to those contained in its explanatory statement, even though additional reasons are available and would be adequate to support the rule. First, there is the cost of the additional rulemaking proceedings required to readopt rules held invalid only because of the inadequacy of the reasons in their explanatory statements. Second, there is the cost of the agencies' inability to enforce rules that are held invalid only because of inadequate reasons in their explanatory statements. While these costs are considerable, they are outweighed by the even more considerable benefits that accrue to society by enforcing the principle that the reasons contained in a rule's concise explanatory statement are exclusive.

Several considerations justify this conclusion. Permitting agencies to rely on post hoc reasons to defend their rules would encourage them to offer false, but convenient, rationalizations for their earlier, otherwise unsupportable actions, and thereby defeat the ideal of comprehensive rationality. After all, the purpose of rulemaking proceedings is to ensure that agencies consider fully the lawfulness and desirability of their proposed rules *at the time of those proceedings*, and that agencies adopt proposed rules *only* if they are lawful and supported by good reasons at the time of those proceedings. If agencies could rely, in defending their rules, on reasons invented subsequent to the adoption of those rules, they could also make their rules in a way that would entirely remove from the scrutiny of the rulemaking process those later justifications which ultimately become the basis for upholding the rule. This, too, would defeat the ideal of comprehensive rationality. In addition, a prohibition on the use of post hoc justifications for a rule is necessary to ensure that agencies faithfully perform another duty dictated by the ideal of comprehensive rational-

82. *Id.* § 3-110(b).
83. *Id.* § 3-110 Comment.
84. *Id.* § 3-112 Comment.

ity: They must consider carefully, *prior* to the time they adopt a rule, *all* of the reasons why they should or should not take that action.[85]

The MSAPA also states that unless otherwise required by law, the agency rulemaking record "need not constitute the exclusive basis for agency action on that rule or for judicial review thereof."[86] Substantial reasons support this provision. The principal effect of requiring an agency to make its rules exclusively on the basis of an agency rulemaking record or limiting judicial review of a rule to such an agency record "has often been the dilution of the regulatory process rather than the protection of persons from arbitrary action."[87] In addition, the burden that would be imposed on agencies by requiring them in every case to assemble their entire factual and argumentative justification for a rule prior to its adoption, and to enter that entire justification in the official agency record of the rulemaking proceeding, is far too great to justify such a requirement.

Other problems would also be created if rules were required to be made or judicially reviewed wholly on the basis of the agency rulemaking record:

> Once it is understood that all persons and groups that may be affected by a proposed rule will be limited to the . . . [agency rulemaking record] in any judicial proceeding challenging the validity of the rule, the parties participating in the . . . [agency proceeding] would multiply—and so would the issues. Only by participation would they be able to affect the contents of the record and preserve the issues they may wish to present to a reviewing court. . . .
>
> Because a reviewing court would refuse to hear any objection to a rule not made during the . . . [agency rulemaking proceeding] participants opposing the proposed rule would voice all possible objections and introduce data to support them. Since it could not know which of these objections might eventually become the basis of a challenge to the rule's validity, the agency would have no choice but to respond—for the ". . . record"—to each objection with its own data and arguments.
>
> All these factors would operate to produce large and diffuse records that the agencies and reviewing courts would find cumbersome to manage. [In addition] . . . the agency would be required to conduct such an on-the-record rulemaking proceeding before issuing any rule, regardless of its importance and even though

85. *Id.* § 3-106(c).
86. *Id.* § 3-112(c).
87. Hamilton, *supra* note 19, at 870-71.

> it is probable that only a small percentage of any agency's rules will be subjected to judicial review.[88]

Finally, it would be unfair to bind parties to judicial review of a rule with the agency rulemaking record as the exclusive basis for the court's determination, if those parties did not participate in the rulemaking proceeding either because they did not know of the proceeding or their interests would not have been affected by the proceeding at that time. That is why the MSAPA states that a petitioner for judicial review of a rule "need not have participated in the rule-making proceeding upon which that rule is based."[89] For all of these reasons, the MSAPA provides that unless otherwise required by law, the agency rulemaking record need not be the exclusive basis for agency action on a rule or for its judicial review.[90]

It is true that the comprehensive rationality ideal would be best served by requiring rulemaking to be initially determined and judicially reviewed wholly on the basis of the agency rulemaking record. However, prior discussion suggests that it would be unwise to impose those requirements on *all* rulemaking of *all* agencies. Good rulemaking procedures must strike a fair balance between the need for effective, efficient, and economical government on the one hand and the need for procedures adequate to protect private rights against unsound or illegal government action on the other. A fair balance between those competing values is inconsistent with creating a right, in *all* rulemaking of *all* state agencies, to have a rule initially determined and judicially reviewed solely on the basis of the agency rulemaking record. In exceptional situations, however, the legislature or an agency may reasonably decide to impose that requirement. The 1981 MSAPA expressly provides for that situation and facilitates its implementation.[91] No more can be expected from a general APA applicable to all rulemaking of all state agencies.

The MSAPA provides that a rule is invalid unless it is issued in substantial compliance with the rulemaking requirements of the Act, and that a proceeding brought to invalidate a rule on that ground may not be brought more than two years after the rule's effective date.[92] Most people affected by a rule will know about it within two years of its effective date. If they neglect, during that period, to challenge the

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88. Auerbach, *Administrative Rulemaking in Minnesota*, 63 MINN. L. REV. 151, 221-22 (1979) (footnote omitted).

89. 1981 MSAPA, *supra* note 8, at § 5-107(1).

90. *Id.* § 3-112(c).

91. *Id.* §§ 4-101(b), -215(d).

92. *Id.* § 3-113.

rule in a court for procedural improprieties in its adoption, they should be deemed to have waived those objections to the rule. This seems especially fair in light of the probable detrimental reliance of others on the rule after several years have passed without a challenge. Furthermore, those who first become affected by a rule more than two years after its effective date are unlikely to have been prejudiced by the agency's failure to follow proper procedures more than two years earlier. It is unlikely that such persons would have participated in its formulation at that earlier time, even if all proper procedures had been followed.

Ordinarily, a rule may be effective only thirty days after its formal filing in a specified central state office, its indexing, *and* its publication in a widely circulated official state periodical.[93] In requiring the publication of a rule a specified time before it becomes effective, as well as its filing and indexing, the MSAPA goes beyond the requirements of many existing state laws. This provision is intended to ensure adequate notice of newly adopted rules to all affected persons so that they may have a reasonable opportunity to prepare for its effective date.

The MSAPA provides that its advance effective date requirement may be waived for a rule that "*only* confers a benefit or removes a restriction on the public or some segment thereof"[94] because, presumably, the beneficiaries of such a rule desire it to be effective as soon as possible. The thirty day advance effective date requirement may also be waived when a rule "*only* delays the effective date of another rule that is not yet effective."[95] This provision enables an agency to delay in a timely manner the effective date of a published adopted rule which contains defects that were brought to the agency's attention subsequent to the publication of that rule but prior to its effective date. Finally, to accommodate important overriding public interests, the advance effective date requirement may be waived for good cause—when an earlier effective date is "*necessary* because of *imminent peril* to the public health, safety, or welfare."[96] This good cause standard is more stringent than the "unnecessary, impracticable, or contrary to the public interest" good cause standard provided by the MSAPA for waiving usual rulemaking requirements.[97] The reason for this is that waiver of the delayed effectiveness period may deny af-

93. *Id.* § 3-115(a).
94. *Id.* § 3-115(b)(2)(ii) (emphasis added).
95. *Id.* § 3-115(b)(2)(iii) (emphasis added).
96. *Id.* § 3-115(b)(2)(iv) (emphasis added).
97. *Id.* § 3-108(a).

fected parties fair notice of the law they must follow, thereby entrapping them, while the former only denies affected parties an opportunity to participate in its formulation. In order to minimize the likelihood of agency abuse of these exemptions from usual effective date requirements, they are very narrowly drawn and the MSAPA provides that, on judicial review, the agency has the burden of justifying its finding that a particular rule is properly within their scope.[98]

The MSAPA contains wholesale exemptions from all rulemaking, rule effectiveness, and rule publication requirements for ten narrowly defined classes of rules. These wholesale exemptions include exclusions for the following types of rules: rules concerning only the internal management of the agency that do not directly and substantially affect the rights or duties of any segment of the public; rules relating to specified types of law enforcement policies whose disclosure would cause enumerated evils; rules relating only to inmates, students, and patients in a state institution, if adopted by that institution; and rules pertaining to the use and maintenance of state owned property.[99] In the case of each one of these wholly exempted types of rules it was determined that the rulemaking procedures, effective date provisions, and formal publication requirements, applicable generally to rules, were either unnecessary, unduly burdensome, or would lead to ineffective, inefficient, or uneconomical government. These excluded classes of rules are, however, still subject to the Model Act's provisions governing public access to agency law,[100] and to its provisions governing judicial review of agency action.[101] Each of the excluded classes of rules is very narrowly drawn. They should be studied carefully because they work a balanced compromise between the need for an effective, efficient, and economical rulemaking process and the need for adequate procedural protections to protect private interests against unsound, politically unacceptable, or unlawful rules.

According to the MSAPA, any person has the right to petition an agency for the adoption, amendment, or repeal of a rule, including a rule that is otherwise wholly exempt from its rulemaking, rule effectiveness, and rule publication requirements.[102] In addition, the Act imposes on agencies specific duties in relation to such petitions, including the duty to take action on the petition within a specific time, and if that action is a denial, to indicate the specific reasons there-

98. *Id.* § 3-115(b)(3).
99. *Id.* § 3-116.
100. *Id.* § 2-101(g).
101. *Id.* §§ 5-102; 1-102(2), (10).
102. *Id.* § 3-117.

for.[103] These provisions are intended to ensure adequate and timely consideration by agencies of the merits of such petitions, thereby implementing the ideal of comprehensive rationality and enhancing the political responsibility of agencies to the community at large.

II. Procedures For Review Of Rules

The Model Act creates three schemes for the external review of agency rules.[104] The first of these schemes involves the governor. To the extent the agency itself would have authority to do so, the MSAPA empowers the governor to veto, that is, to rescind or suspend, all or a portion of any agency rule, or to terminate any agency rulemaking proceeding. This action may be taken at any time, and for any reason. A gubernatorial veto of an adopted rule must be executed by an executive order that is subject to all of the Act's requirements applicable to the adoption and effectiveness of a rule.[105] When the governor terminates an ongoing agency rulemaking proceeding, however, the governor may do so with an executive order that is not subject to those requirements; but the governor must state the reasons for the termination of those proceedings in the order.[106] In the performance of this function, the governor is to be assisted by a newly established administrative rules counsel.[107]

This scheme for executive review of rules is designed to facilitate coordination of all state agency policymaking by the official ultimately responsible under the state constitution for the administration of all state laws. It also implements the political model of administrative rulemaking because it provides a direct political check on lawful agency rules that the community at large finds unacceptable. Note that the governor is elected and therefore is directly responsible to all of the people at the polls, and that the governor must exercise the veto authority over rules by a prescribed means that itself is calculated to ensure that its consequences are politically acceptable. Empowering the governor to veto an agency rule at any time rather than only at a time close to its adoption is desirable because a rule that is acceptable to the body politic at the time of its adoption may become unacceptable at a later time due to changed circumstances. Furthermore, the political unacceptability of a rule may come to the attention of the

103. *Id.*

104. Note also that agencies are required to review all of their own rules on a periodic and formal basis, and to issue a public written report thereon. *Id.* § 3-201.

105. *Id.* § 3-202(a).

106. *Id.* § 3-202(b).

107. *Id.* § 3-202(c).

governor at a time far removed from its adoption, when complaints by affected persons alert the governor to the unacceptability of that rule.

The MSAPA also creates a comprehensive scheme for the legislative review of agency rules. To implement the political model of administrative rulemaking, it reaffirms the authority of the directly elected legislature to veto a rule by statute.[108] However, the Model Act rejects vetoes or suspensions of particular administrative rules by one or two houses of the legislature acting alone, or by a legislative committee acting alone.[109] It does so because there are significant state constitutional objections to such legislative vetoes or suspensions of otherwise lawful rules by means other than the enactment of a statute.[110] It also does so because the legislature's use of such nonstatutory devices for this purpose is undesirable.[111] Many reasons support this conclusion.

First, mechanisms for the veto or suspension of administrative rules by one or two houses of the legislature or by a legislative committee, acting alone, eliminate an important feature of the statutemaking process—the authority of the governor to veto such legislative action. In doing so, they weaken the governor's bargaining power with the legislature, and disable that official from checking legislative action the governor deems unsound. These mechanisms, therefore, unduly aggrandize the power of the legislature at the expense of the governor.

Furthermore, a mechanism for the legislative veto or suspension of particular state agency rules is useful primarily as a check against unwise rules that are otherwise clearly lawful, since an effective check against *unlawful* rules is provided by the courts. Consequently, a legislative veto or suspension of particular agency rules by means other than statutory will have its primary practical impact on *lawful* rules and, in effect, would constitute a pro tanto narrowing of the original authorizing legislation under which those rules were properly issued. A narrowing of that authorizing legislation should be executed in the same manner as the original legislation. Otherwise, a committee, one house, or two houses of the state legislature, acting alone, would continually be in a position to nullify proper authorizing action of the more representative and more definitive lawmaking process by which statutes are adopted.

In some cases the existence of a legislative mechanism to veto or suspend rules by less than statutory means may also encourage people

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108. *Id.* §§ 3-203, -204(c).
109. *Id.* § 3-204 Comment.
110. *Id.* § 3-204 Comment; *see also* A. BONFIELD, *supra* note 8, at § 8.3.2(c).
111. 1981 MSAPA, *supra* note 8, at § 3-204 Comment.

to reduce their participation in the agency rulemaking proceeding and, instead, induce them to concentrate their efforts on securing a legislative veto or suspension. To the extent that this were to occur, the agency rulemaking process would become superfluous, and many of the important public benefits resulting from that process would be lost. Authorizing one or two houses of the legislature or a legislative committee to nullify or suspend particular agency rules by means other than the enactment of a statute may also induce administrators to develop rules primarily on the basis of contacts with legislators rather than on the basis of public rulemaking proceedings. While contacts with legislators on this subject *are* essential so that the agency can accurately estimate the political acceptability of its proposed action, agency reliance upon those contacts should not become the primary source of information for the agency with respect to the matter in question, because that would render the formal mechanisms for public participation in agency rulemaking superfluous.

In practice, such a legislative veto or suspension scheme might also facilitate overinvolvement of the legislative branch in the day-to-day administration of programs created by statute. Furthermore, it might induce an unhealthy split in perceived authority over purely administrative matters, it might confuse the public as to the locus of responsibility for administrative rulemaking, and it might enable the executive branch and the legislature to pass responsibility for such rulemaking back and forth between themselves in a way that allows each to blame the other for its own deficiencies. In addition, an authorization of one house, two houses, or a legislative committee to veto or suspend particular agency rules might also give the legislature a false sense of security, and actually cause it to reduce its overall efforts to review agency rulemaking in an effective way. This result would be very unfortunate because, in practice, devices of this kind are not likely to be especially effective in eliminating from the huge mass of agency lawmaking rules that are politically unacceptable, unsound, or illegal. Legislatures do not have the time, expertise, staff, or resolve to exercise these mechanisms in a way that would effectively secure that result for most such agency rules.

Finally, it should be noted that schemes for the veto or suspension of particular agency rules by the action of one or two houses of the legislature, or by a committee of the legislature, acting alone, are viewed by agencies as particularly illegitimate because the agencies understand that their authority derives from the entire statutory lawmaking process. From the point of view of the agencies, these devices also appear to be unusually susceptible to improper and unrepresentative influences that may interfere with their properly authorized missions.

Consequently, the existence of these devices is likely to cause agencies to make as much of their controversial law as is possible by ad hoc adjudication, which is not subject to a legislative veto or suspension by means less than statutory, rather than by rules which are subject to such mechanisms. However, any increase in agency lawmaking by ad hoc adjudication is undesirable.[112]

The MSAPA provides for the review of agency rules by a designated, standing, joint legislative committee.[113] This legislative rules review committee is vested with two major powers calculated to act as effective checks on agency rulemaking. First, the committee is empowered to object formally, at any time, to all or any part of a rule on the grounds that it is "beyond the procedural or substantive authority delegated to the adopting agency."[114] The agency must then respond in writing to the committee objection, at which time the committee may withdraw or modify its objection.[115] The existence of the objection is indicated adjacent to the rule when it is published. So long as the objection has not been withdrawn, the agency has the burden to demonstrate that the rule or portion of the rule to which it applies is lawful, whenever it is challenged in court.[116] Empowering the legislative committee to object to a rule at any time because it is ultra vires may be justified on two grounds: First, a rule that is lawful at the time of adoption may become unlawful at a later time due to a change in circumstances; second, because of staff limitations, the legislative committee is unlikely to be able to review effectively all new rules of all agencies at the time of their adoption, to satisfy itself that they are within the authority of the agencies that adopted them.

Shifting the burden of persuasion to an agency after the filing of such a formal legislative committee objection may be justified on several grounds. It is logical to shift to the agency the burden of demonstrating the validity of a rule in subsequent litigation when the designated legislative rules review committee objects to the rule on the ground that it is unlawful. Unlike the agency, the members of that legislative committee are directly accountable to the public at the polls

112. *See generally* Bonfield, *supra* note 33.

113. 1981 MSAPA, *supra* note 8, at §§ 3-203, -204.

114. *Id.* § 3-204(d)(1).

115. *Id.* § 3-204(d)(4).

116. *Id.* § 3-204(d)(5). While Florida Statute section 120.545 (1989) authorizes a Florida legislative committee to object to a rule, the Florida Act differs from the MSAPA in one important respect. The Florida Act is unclear about the actual effect of such a committee objection. The Florida Act only states that an agency rule adopted in the face of a committee objection will have notice of the objection published along with the rule. FLA. STAT. § 120.545(8) (1989). It does not indicate what effect that notice will have in subsequent litigation.

and represent the body that created the agency and vested it with whatever authority the agency may lawfully exercise. That committee also develops over time special competence to monitor the lawfulness of agency rulemaking. Therefore, the usual presumption of validity accorded an agency rule[117] should not apply when such a legislative committee believes the rule to be beyond the authority of the issuing agency. After all, where a rule has been objected to by the legislative rules review committee—a body that has special competence to review the legality of agency rulemaking, that represents the legislature from which all agency powers flow, and that is independent of the agency and directly accountable to the people through the electoral process—there are good grounds to believe that the rule is or may be unlawful and, therefore, that the burden of persuasion should be on the agency to demonstrate that it is lawful.

Note, in this connection, that each agency has a vested interest in construing statutes delegating authority to it as broadly as possible because such a construction increases the authority of the agency. Institutional self interest inevitably leads agencies to resolve doubtful questions respecting the meaning of a legislative enactment in their own favor, even though agencies may exercise only that authority expressly or impliedly delegated to them by the legislature. On the other hand, the legislature already has the authority, which it may exercise at any time, to reduce the power of an agency by amending or repealing its enabling act. And while the legislature has a vested interest in assuring that agencies do not exceed the rulemaking authority the legislature granted them and that legislative supremacy over agency powers is fully maintained, the legislature seeks only to construe the intended scope of *its own action* by authorizing the performance of this review function by one of its committees. Consequently, the legislature is not as clearly engaged in a self-interested process of aggrandizing its own institutional authority as is an agency when the agency construes the scope of its enabling statute—the action of another body—to determine the scope of the agency's own powers. This, then, is another reason why the views of the legislative rules review committee, an *authorized representative* of the lawgiver, should be preferred, at least initially, to the views of the agency when the two bodies disagree about the scope of agency rulemaking powers in a particular instance.

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117. *See* Thompson v. Consolidated Gas Utils. Corp., 300 U.S. 55, 69 (1937); United States v. Chemical Found., Inc., 272 U.S. 1, 14-15 (1926); Mathiasen v. State Conservation Comm'n, 246 Iowa 905, 910, 70 N.W.2d 158, 161 (1955); 29 AM. JUR. 2d *Evidence* § 172 (1967). *See also* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 11.04 text accompanying n.34, at 56, § 11.06, § 16.07 text accompanying nn.7-11, at 456-57 (1958).

Note, however, that in the end, the administrative rules review committee "is only authorized to alter one aspect of the procedure by which *the legality of the rule will finally be determined by the courts.*"[118] This is so because the MSAPA provides that the final decision with respect to the validity of such a rule rests with the courts and not with the legislative committee. Nevertheless, *in close cases*, the shift in the burden of persuasion as to the validity of a rule resulting from an objection by the legislative rules review committee will often determine the outcome of such suits. Consequently, a legislative committee with authority to object to agency rules in the manner prescribed by the MSAPA will provide a credible check on illegal agency rulemaking. The mere existence of this mechanism is likely to cause agencies to think twice before adopting rules of doubtful legality, and to induce them to withdraw adopted rules of that kind after an objection has been made.

There are adequate safeguards surrounding the exercise of this legislative committee power to ensure that it is exercised in a responsible and reasonable manner. As noted, the MSAPA provides a clear standard against which the committee must operate when it considers whether to file an objection to a rule. In addition, the committee must conduct its proceedings in public[119] and must include the specific reasons for its action in the published objection,[120] so that courts and others who wish to examine the specific grounds supporting an objection may easily do so. Finally, the objection device would appear to be constitutional under most state constitutions.[121]

It might be wise to add to the MSAPA provision authorizing the administrative rules review committee to object to an agency rule because the rule is ultra vires, a provision authorizing plaintiffs, who successfully challenge a rule after the filing of such an objection, to obtain a judgment against the agency for court costs and reasonable attorney's fees. This unusual remedy might be justified under these circumstances because the filing of such an objection by a politically responsible body independent of the agency lends special credibility to the claim that the agency rule in question is illegal, and it would "remove one obstacle—financial expense—that discourages persons from seeking judicial review of unlawful agency rules."[122]

The MSAPA vests the designated, standing, joint legislative rules review committee with a second major power. It is calculated to check

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118. 1981 MSAPA, *supra* note 8, at § 3-204 Comment.
119. *Id.* § 3-204(b).
120. *Id.* § 3-204(d)(1).
121. *See* A. BONFIELD, *supra*, note 8, § 8.3.3(k).
122. 1981 MSAPA, *supra* note 8, at § 3-204 Comment.

unsound or politically unacceptable agency rulemaking. That committee may require an agency to publish as a proposed rule of the agency a committee recommendation that the agency adopt, amend, or repeal a rule, and to hold a rulemaking proceeding thereon. But after that publication and the rulemaking proceeding, the agency is free to ignore the recommendation of the committee.[123] This provision implements the ideal of comprehensive rationality by ensuring fully informed agency decisionmaking on the subject of a committee recommendation that the agency repeal, amend, suspend, or adopt a rule. It is also geared to ensure increased agency accountability to the public by focusing some of the same political pressures on the agency, with respect to the subject at issue, as would be focused on the legislature. That is, this mechanism is calculated to more fully implement the political model of administrative lawmaking by forcing the agency to calculate the acceptability to the body politic of its contemplated action with respect to the recommendation of the legislative committee.

Authorizing the legislative rules review committee to *require* an agency to initiate such a rulemaking proceeding for this purpose does not seem to be an undue legislative encroachment on lawful administrative initiatives. After all, the MSAPA expressly reserves to the agency full and final authority to decide whether, after that proceeding, it will adopt or reject the proposed rule embodying the committee recommendation. Of course, if the agency inaccurately gauges the acceptability to the political processes in the community at large of its action with respect to the recommendation of this legislative committee, the agency will pay a serious price. In that situation, the action of the agency is likely to be overridden by statute, and the agency is likely to be punished in some way by the legislature for its disregard of political realities. But this result is sound because the wishes of the community at large, as reflected in the current balance of interest group politics in the state, should prevail over the wishes of the agency, even if the position of the agency is both sound on its technical merits and lawful.

The MSAPA contains a third scheme for the external review of agency rulemaking. It creates a comprehensive scheme for the judicial review of agency rules, along with other agency action.[124] However, the provisions of the Model Act pertaining to the judicial review process are beyond the scope of this article. The same is true of the MSAPA requirements that would force agencies, "as soon as feasible

123. *Id.* § 3-204(e).
124. *Id.* at art. V.

and to the extent practicable," to make their law through rulemaking rather than through ad hoc adjudication, and to the extent they continue to make their law ad hoc in the course of individual cases, to embody that law subsequently in rules.[125] The Model Act provisions pertaining to both of these subjects are discussed at length elsewhere.[126]

III. CONCLUSION

The rulemaking and rule review provisions of the 1981 MSAPA are surely not perfect. In general, however, they represent progress in the ongoing quest for ideal procedures relating to this subject. They effectively create a rulemaking process that is, to the extent feasible and practicable, both politically sensitive and comprehensively rational. They also strike a reasonable balance between the need for effective, efficient, and economical state government and the need for procedures calculated to ensure that rulemaking is politically acceptable, technically sound, lawful, and fair. Each state should, therefore, examine the rulemaking and rule review provisions of the 1981 Model Act and import into its own law as much of this most recent effort as is possible.

It could be argued, however, that the 1981 MSAPA rulemaking provisions fall short of ideal in one major respect. Those provisions may not go as far as they should to ensure that the procedures imposed on state agencies are proportioned to the relative significance of the varying substantive and process matters at stake in rulemaking proceedings. An effort to ensure that required procedures are adequately proportioned to the relative significance of the matters at stake is important for two principal reasons: First, it would reduce the cost of the overhead of our administrative bodies to the minimum required to accomplish their objectives; second, it would provide a reasonable assurance that, in practice, the benefits of prescribed procedures actually exceed the cost of those procedures.

The formulation of rulemaking requirements calculated to ensure that the procedural overhead involved is satisfactorily proportioned to the importance of the substantive and process matters at stake is not an easy task. After all, the substantive matters involved in the various agency programs implemented by these procedures differ widely in their importance because the many regulatory and benefactory pro-

125. *Id.* § 2-104(3)-(4).

126. The judicial review provisions of the MSAPA are discussed at length in A. BONFIELD, *supra* note 8, at § 9. The required rulemaking provisions of the MSAPA are discussed at length in Bonfield, *supra* note 33.

grams undertaken by our governments today are extremely heterogeneous in their nature, purpose, and effect. The process matters involved in agency rulemaking proceedings also differ widely in their importance because the values relating to process sought to be advanced by rulemaking procedures are also very heterogeneous in nature; they range from the preservation of human dignity and citizen satisfaction with government to the maintenance of our traditions, rationality, objectivity, and predictability. In addition, the need for each rulemaking procedure differs widely in light of the varying objectives of each of those procedures, the varying effectiveness of each of those procedures in achieving its objectives, and the varying availability of less costly means for achieving the desired objectives. Furthermore, the relative importance of each of the many different matters at stake in rulemaking proceedings is also difficult to establish, because it depends in large part upon subjective value judgments. Finally, some of the procedures designed to further substantive objectives of agency programs may interfere with the effective and efficient accomplishment of the mission of some of the procedures designed to achieve process objectives, and vice versa. This will require a determination as to which of these desired objectives should be preferred, and to what extent. This, too, will involve difficult subjective value judgments.

Nevertheless, we should make an effort to ensure, as far as possible, that the rulemaking requirements we impose on agencies are proportioned to the relative importance of the varying matters at stake. After all, maximization of the public interest requires an allocation of scarce societal resources to their most productive use. In addition, the cost of these required rulemaking procedures may sometimes unnecessarily or unjustifiably interfere with an agency's ability to achieve the substantive objectives of its programs because that cost may unnecessarily or unjustifiably reduce the resources available to the agency for achieving those objectives. Of course, relatively expensive rulemaking procedures could be necessary to ensure that a particular program is executed reliably and accurately, and in the precise manner contemplated by the legislature. One may inquire, however, whether the specific benefits produced by those particular procedures outweigh their costs, and whether there are less expensive means for satisfactorily accomplishing similar results.

Prior discussion demonstrates that, insofar as possible, ideal rulemaking procedures should be proportioned to the importance of the matters at stake so that their total benefits outweigh their total costs and so that they are the least expensive means for securing the desired objectives. The 1981 MSAPA might be criticized because its rulemaking requirements are not adequately calibrated to the widely disparate

importance of the many varying substantive and process matters at stake in such proceedings. It may reasonably be argued that the MSAPA good cause exemption[127] does not adequately accomplish this result, and that the undue rigidity of the MSAPA rulemaking scheme precludes its accomplishment.

The 1961 MSAPA and the many state acts based upon that earlier Model Act contain only a single scheme for regulated rulemaking—a scheme based upon legislative style, notice and comment procedures.[128] On the other hand, the federal APA creates two classes of regulated rulemaking, each governed by a different set of procedures. Formal rulemaking (rulemaking required by statute to be determined on a record after an opportunity for a hearing) is subjected by the federal APA to most of the same judicial style procedures required for formal adjudication.[129] Informal rulemaking (rulemaking other than formal rulemaking and exempted rulemaking) is subjected by the federal APA to legislative style, notice and comment procedures.[130] The 1981 MSAPA follows the federal APA, creating only two classes of regulated rulemaking, each governed by a different set of procedures. Judicial style rulemaking, involving trial type procedures, is applicable only when a statute other than the MSAPA expressly requires the provisions of the MSAPA governing adjudication to apply to particular rulemaking.[131] Legislative style, notice and comment rulemaking procedures apply to all other rulemaking governed by that act.[132]

As a result, the rulemaking scheme created by the 1981 MSAPA appears to be both overinclusive and underinclusive. Viewed in light of the significance of the widely varying matters at stake in such proceedings, the investment in procedural overhead required by the 1981 MSAPA will be inadequate in some instances of rulemaking and excessive in others, because of the undue rigidity of the MSAPA rulemaking scheme. After all, any dispassionate assessment of the many diverse matters at stake in such proceedings would necessarily conclude that they could sensibly be grouped on the basis of their relative importance into more than two categories and, therefore, that the justifiable investment in procedural overhead in such proceedings should be more variable than that permitted by a bipolar system. Note, in this connection, that dissatisfaction with the federal APA bipolar scheme for regulated rulemaking—formal, judicial style procedures or

127. *See supra* text accompanying notes 45-52.
128. 1961 MSAPA, *supra* note 48, at §§ 3-5.
129. 5 U.S.C. §§ 553(c), 556-557 (1982).
130. 5 U.S.C. § 553 (1982).
131. 1981 MSAPA, *supra* note 8, at § 4-101(b), art. IV.
132. *Id.* art. III.

informal, legislative style procedures—has led Congress to create, on an ad hoc basis, hybrid procedures for a significant number of newly authorized types of administrative rulemaking.[133] In some situations, hybrid procedures have a distinct advantage. They allow Congress to more carefully calibrate the procedures required for specified classes of rulemaking to the relative importance of the matters at stake than the current, more rigid, bipolar system in which required rulemaking must involve either full trial type proceedings or minimum notice and comment proceedings.

Therefore, consideration should be given to amending the 1981 MSAPA so that it would create several distinct classes of agency rulemaking, each subject to different procedural requirements specially tailored to the needs and circumstances of that particular class. In order to increase the effectiveness of administrative rulemaking, ensure that the benefits of applicable procedural requirements exceed their costs, and ensure that those requirements are the least expensive means for securing desired objectives, it may be desirable to create as many as five separate classes of regulated rulemaking of descending degrees of formality and complexity and, therefore, cost. In that way, there will be a greater opportunity to secure an adequate match between the procedures required and the significance of the matters at stake in each type of rulemaking. The MSAPA might prescribe in detail all of the elements of the most formal and complex, hence most expensive, class of such rulemaking proceedings. It could then define each of the less formal and complex, hence less expensive, classes of rulemaking proceedings by reference to its relationship to the most formal and complex class, so that each of the relatively less expensive classes of rulemaking proceedings would be peeled down versions of the most expensive class. The adjudication article of the 1981 MSAPA uses a similar device to create several different classes of adjudication, each governed by different procedures of descending degrees of formality and complexity and, therefore, cost.[134] The five classes of rulemaking suggested here might generally be described as follows: full judicial style rulemaking governed wholly by the MSAPA adjudication provisions; partial judicial style rulemaking governed by some of the MSAPA adjudication provisions and some of its current legislative style rulemaking provisions; full legislative style rulemaking governed by all of the current MSAPA legislative style rulemaking provisions; partial legislative style rulemaking governed by some of the current MSAPA legislative style rulemaking provisions; and sum-

133. ACUS, A Guide To Federal Agency Rulemaking 131 (1983).
134. 1981 MSAPA, *supra* note 8, at art. IV.

mary rulemaking governed by very minimum, newly devised provisions.

Of course, empirical studies and experiments will be useful to verify the assumption that such a multi-classed scheme for rulemaking would be more desirable than the existing scheme. If the mechanism by which each rulemaking is initially placed in the appropriate class is not sufficiently accurate and efficient, it could increase rather than decrease the cost of agency procedural overhead as compared to the current system. Consequently, some care must be taken in the consideration of any such reform to be sure that it can deliver in practice as much as it appears to promise.

As noted, in implementing a reform of this kind, an efficient and effective mechanism will be needed for assigning each rulemaking to a particular class on the basis of the importance of the matters at stake. This means that determinations will necessarily have to be made about the appropriate placement, within the several classes of rulemaking proceedings, of particular types of rulemaking. For reasons noted earlier, these determinations will inevitably present great difficulties. They will require, for a wide variety of rulemaking, an assessment of the relative importance of the substantive and process matters at stake, as well as a determination of the desirability of particular procedures in light of the significance of those matters and the availability of less costly alternatives. However, a possible solution to this problem is also suggested by the 1981 MSAPA adjudication provisions. It may be wise to remit the process of selecting appropriate agency procedures, within *general* guidelines furnished by the directly elected legislature, to a highly visible, politically accountable rulemaking scheme conducted by the affected agency.[135] This solution may provide a sensible and widely acceptable means for determining, consistent with democratic theory, the relative importance of the matters at stake in various kinds of agency proceedings and the consequent level of expenditure for procedural overhead that is justified in those proceedings.

There is no doubt that the quest for an ideal rulemaking procedure must continue. The nature of the quest is such that it has no final termination point. After all, in the end, what is viewed as an ideal rulemaking procedure is a matter of judgment, and will vary, depending upon contemporary values and circumstances. It is also true that experience with so-called ideal provisions and further experimentation with new provisions will dictate changes in what may be considered to

135. *Id.* §§ 4-201, -401, -502.

be, at any particular time, optimum rulemaking provisions. Therefore, the views expressed here with respect to the 1981 MSAPA and an ideal system of state administrative rulemaking must, of necessity, be subject to subsequent revision in light of additional insights and experience.